Supreme Court, U.S.
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91-1759

No. _____

SUPREME COURT OF THE UNITED STATES

October Term, 1991

SKY AD, INC. and ROBERT CANNON, *Petitioners*

v.

HOMER C. MCCLURE, FORMER WESTERN PACIFIC REGIONAL DIRECTOR, FEDERAL AVIATION ADMINISTRATION ("FAA"), JACQUELINE SMITH, WESTERN PACIFIC REGIONAL AIR TRAFFIC MANAGER, FAA, MERLE CLURE, FORMER WESTERN-PACIFIC REGIONAL ACTING AIR TRAFFIC MANAGER,FAA, JOHN MAYRHOFFER, FORMER WESTERN-PACIFIC REGIONAL MANAGER, AIR TRAFFIC OPERATIONS, FAA, JAMES A. HOLWEGER, FORMER WESTERN-PACIFIC REGIONAL ASSISTANT AIR TRAFFIC MANAGER, FAA, AND THE UNITED STATES OF AMERICA, *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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April 1, 1992

QUESTIONS PRESENTED:

1. Is a federal agency's express failure and/or refusal to comply with its own mandatory, nondiscretionarystatutes, regulations and orders actionable under the Federal Tort Claims Act, 28 U.S.C. § 1346(b), if the nondiscretionary statutes, regulations and orders allegedly violated relate to the promulgation of new substantive agency rules?

2. Does the presumed availability of judicial review of any unconstitutional agency action as a matter of settled federal common law constitute a factor counselling hestitating in providing a Bivens remedy to one injured by that agency action?

3. Did Congress ever intended to provide any comprehensive remedial scheme for unconstitional rulemaking conduct by employees of the Federal Aviation Administration, which would bar the availability of a Bivens Action by an injured citizen under this Court's ruling in Schweiker v. Chilicky, 487 U.S. 412 (1988)?

LIST OF PARTIES:

The parties to the proceedings below were the Petitioners, SKY AD, INC., A California Corporation and ROBERT CANNON, An Individual, Petitioners. SKY AD, INC., A California Corporation, has no parents, subsidiaries or affiliates to list pursuant to Rule 28.1

The respondents are HOMER C. MCCLURE, FORMER WESTERN PACIFIC REGIONAL DIRECTOR, FEDERAL AVIATION ADMINISTRATION ("FAA"), JACQUELINE SMITH, WESTERN PACIFIC REGIONAL AIR TRAFFIC MANAGER, FAA, MERLE CLURE, FORMER WESTERN-PACIFIC REGIONAL ACTING AIR TRAFFIC MANAGER, FAA, JOHN MAYRHOFFER, FORMER WESTERN-PACIFIC REGIONAL MANAGER, AIR TRAFFIC OPERATIONS, FAA, JAMES A. HOLWEGER, FORMER WESTER-PACIFIC REGIONAL ASSISTANT AIR TRAFFIC MANAGER, FAA, and THE UNITED STATES OF AMERICA.

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SUPREME COURT OF THE UNITED STATES

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HOMER C. MCCLURE, FORMER WESTERN PACIFIC REGIONAL DIRECTOR, FEDERAL AVIATION ADMINISTRATION ("FAA"), JACQUELINE SMITH, WESTERN-PACIFIC REGIONAL AIR TRAFFIC MANAGER, FAA, MERLE CLURE, FORMER WESTERN-PACIFIC REGIONAL ACTING AIR TRAFFIC MANAGER,FAA, JOHN MAYRHOFFER, FORMER WESTERN-PACIFIC REGIONAL MANAGER, AIR TRAFFIC OPERATIONS, FAA, JAMES A. HOLWEGER, FORMER WESTERN-PACIFIC REGIONAL ASSISTANT AIR TRAFFIC MANAGER, FAA, AND THE UNITED STATES OF AMERICA, *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioners, SKY AD, INC. and ROBERT CANNON, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above-mentioned proceedings on December 24, 1991.

OPINION BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 951 F.2d at 1146, and is reprinted in the Appendix hereto.

JURISDICTION

Invoking federal jurisdiction under 28 U.S.C. §§ 1331, and 1346(b), the Petitioners brought this suit in the Central District of California. On April 4, 1990, the District Court, Dismissed the Petitioners' Bivens claims against the individual respondents, and on August 3, 1990, the Court entered summary judgment against Petitioners on the Federal Tort Claim.

On Petitioners' timely appeal of the aforementioned dismissal and summary judgment, the Ninth Circuit on December 24, 1991, entered a judgment and opinion affirming the District Court's dismissal and grant of summary judgment. The Appeals Court's opinion affirming the summary judgment was based on grounds neither previously raised by Respondents prior to the opinion and order, nor relied upon by the District Court.

On March 20, 1992, Justice O'Connor ordered that the time for the filing of this petition for writ of certiorari be extended to and including April 2, 1992.

The jurisdiction of this Court to review the judgment of the Ninth Circuit is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Petitioner ROBERT CANNON is the sole owner of Petitioner, SKY AD, INC., which had been in the business of aerial banner towing along the Southern California shoreline for more than two decades. That business was summarily destroyed on August 18, 1987. On that date, without any prior notice or opportunity to comment, the individual Respondents (who were officers of the Federal Aviation Administration) issued Petitioner CANNON an informal letter banning Petitioners' use of the shoreline airspace ("shoreline transition") upon which their lifelong livelihood had critically depended.

In October, 1987, acting through a trade assocation, Petitioners sought judicial review of the letter ban as prescribed by 49 U.S.C. Section 1486(a). That statute expressly holds that a petition for review directly to the Circuit Court of Appeals shall be the exclusive means of judicial review of an order of the Federal Aviation Administration.

On August 1, 1989, the Ninth Circuit Court of Appeals issued an opinion and order in *Southern California Aerial Advertisers Assocation v. Federal Aviation Administration* ("*SCAAA*"), 881 F.2d 672 (9th Cir. 1989), granting the petition and invalidating the letter ban.

Therein, the Ninth Circuit observed that Petitioners were among those who "have been making banner-towing flights along the Southern California coastline for over forty years...[requiring them] to pass through an area west of LAX [Los Angeles International Airport] known as the "shoreline transition." 881 F.2d at 673. Petitioners, to engage in their banner-towing enterprises were required to display their aerial ads along "the entirety of the Southern California beach front communities...includ[ing] numerous Beaches north of LAX, which are accessible to [Petitioners'] aircraft only by passing through the disputed airspace." 811 F.2d at 674.

"The fact that banner-towing aircraft have on occasion made more than forty requests per day for permission to travel through the shoreline transition attest[ed] to the importance of the shoreline transition to [Petitioners]." 881 F.2d at 673.

In granting Petitioners' petition for review in *SCAAA*, supra, the Ninth Circuit Court therein concluded that the August 18, 1987 letter was, as asserted by Petitioners therein, a ban on their use of the subject shoreline transition, and therefore a critical use of that navigable airspace, and thus was a substantive rule affecting the use of that airspace. 881 F.2d at 675. The Ninth Circuit further determined that the letter ban was illegally issued, because respondents had failed to adhere to the mandatory rule-promulgation requirements of the Federal Aviation Act, 49 U.S.C. § 1348(d), the Administrative Procedure Act, 5 U.S.C. § 553(b), and impliedly even the FAA's own internal airspace rulemaking regulations, 14 C.F.R. §§ 11.61, et seq., or any of the specified alternatives set forth therein. 881 F.2d 676-678.

The Ninth Circuit's August 1, 1989 opinion and order in SCAAA, supra, coming almost two years after the ban's implementation, arrived too late to save the Petitioners' livelihood. During the two year pendency of the Ninth Circuit's ruling, Petitioners sat grounded, helplessly watching the systematic destruction of their business occasioned by the ban, which remained continuously in place. Petitioners' early efforts to seek temporary injunctive relief from the Ban were furiously opposed by the FAA, and as a result, proved unsuc-

cessful. See, 881 F.2d at 674, n.2. When the Ninth Circuit finally ruled on August 1, 1989, Petitioners' banner-towing business had all but been wiped out.

On January 18, 1990, following this Court's ruling in *SCAAA, supra,* Petitioners commenced this action for damages arising from the violation and denial by the individual respondents, i.e., those FAA officials responsible for imposition of the illegal ban, of Petitioners' constitutional procedural due process and equal protection rights, under the doctrine enunciated by this Court in *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971).

Petitioners amended the complaint on March 6, 1990, to add a third count under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 1346(b), against respondent, United States, for negligence arising from its employees' failure and refusal to follow their mandatory statutes and regulations prerequisite to any legal implementation of such an airspace ban.

On April 2, 1990, the individual respondents moved to dismiss the Petitioners' Bivens counts, pursuant to Federal Rules of Civil Procedure, Rule 12(b)(6), for failure to state a claim upon which relief could be granted. The District Court, the Honorable Manual L. Real, presiding, granted that motion. Petitioners' request that the dismissal be certified for interlocutory appeal was denied.

On April 26, 1990, Petitioners were denied their rights to develop their discovery which had been pending and in fact which was due the following day, when the District Court granted an ex parte motion to stay all discovery until respondent, USA's motion for summary judgment could be filed. This was done over Petitioners' objection based on the ground that the pending discovery was needed by them to defend against the factual issues raised by USA's summary judgment motion.

On July 30, 1990, the District Court heard and granted respondent, USA's motion for summary judgment. The motion, granted in part on the basis of factual findings Petitioners could not address as their discovery had been cut off, was granted over Petitioners' renewed objection that their discovery needed to address the motion's factual issues had been denied them, and without any ruling on their evidentiary objections to the inadmissible and irrelevant matters offered via affidavit by the movant's declarants, as factual cornerstones of the motion.

Timely appeal to the Ninth Circuit Court of Appeals was taken by Petitioners from the District Court's dismissal order and grant of summary judgment on August 15, 1990, pursuant to 28 U.S.C. § 1291.

On December 24, 1991, the Ninth Circuit Court of Appeals issued its opinion and order in the underlying case, *Sky Ad, Inc., v. McClure,* 951 F.2d 1146 (9th Cir. 1991), review of which by this Court is sought herein.

Therein the Ninth Circuit affirmed the District Court's grant of summary judgment on the Petitioners' FTCA claim, but not on any ground advanced by respondents. Nor did the Ninth Circuit rule on any of the District Court's errors urged by the Petitioners. Indeed, the Ninth Circuit did not review the summary judgment at all.

Rather, the Ninth Circuit advanced a basis for upholding the summary judgment never raised prior to issuance of its opinion and order, to wit, that "Congress did not intend the FTCA to establish liability in tort for failure to comply with the publication and comment requirements for administrative rulemaking." 951 F.2d at 1147.

Notwithstanding the fact that the Ninth Circuit had previously and conclusively adjudicated the illegality of the August 18, 1987 letter ban in the separate case of *SCAAA*, supra, 881 F.2d 672, the Ninth Circuit in *Sky Ad, supra,* recited "[a] House Report on the FTCA [which] stated" '[It is not] desirable or intended that the constitutionality of legislation, or the legality of a rule or regulation be tested through the medium of a damage suit for tort,' H.R.Rep. No. 1287, 79th Cong., 1st Sess. 6 (1945). Accordingly, [Petitioners'] claim must be dismissed." Id., 951 F.2d at 1147.

In reaching its ruling affirming the grant of summary judgment in favor of respondent, USA, the Ninth Circuit proclaimed the consistency of its reasoning with that of the Second Circuit's decision in *C.P. Chemical Co., Inc. v. United States,* 810 F.2d 34 (2d Cir. 1987) [holding no FTCA liability for failure to follow applicable notice and comment procedures inapplicable since United States could not be held liable where no such comparable cause of action existed against a private citizen, and on basis of discretionary function exception, as "procedures by which a rule is adopted are integral to, and intertwined with, the decision to adopt the substantive regulation." Id., 810 F.2d at 37-38]; and that of the D.C.Circuit in *Jayvee Brand, Inc. v. United States*, 721 F.2d 385, 395

(D.C. Cir. 1983) [opinion of Bork, J., not joined in by other panel members], holding an agency's failure to follow applicable notice and comment procedures was the "type [of action] that private persons could not engage in and hence could not be liable for under local law." 810, F.2d at 37-38];

The Ninth Circuit did not address the Petitioners' argument that, in the advent of this Court's decision in *Berkovitz v. United States*, 486 U.S. 531 (1988) [decided well after both *C.P. Chemical Co, supra,* and *Jayvee Brand, supra*] "the discretionary function exception will not apply when a federal statute, regulation or policy specifically prescribes a course of action for an employee to follow. In this event, the employee has no rightful option but to adhere to the directive." 486 U.S. at 536. Nor did the Ninth Circuit address this Court's admonition in *Berkovitz, supra*, one again expressly "disapproving [the government's] argument that [the] FTCA precludes liability for the performance of 'uniquely governmental functions'." 486 U.S. at 539.

Although the Ninth Circuit candidly admitted that "we have not located any explicit discussion of the precise question presented here," the Court nonetheless held the Petitioners' *Bivens* claims were properly dismissed, as "the unprecedented nature of [Petitioners'] tort theory,...the explicit remedies of the APA and Congress' rejection of tort remedies under the FTCA for procedural flaws in rulemaking" constitued "factors counselling hestitation" precluding making a *Bivens* remedy available to Petitioners, *citing, Kotarski v.Cooper,* 866 F.2d 311 (9th Cir. 1989). *Sky Ad, supra,* 951 F.2d at 1148-1149.

The Ninth Circuit did not rule on any of the other grounds advanced by the individual respondents and the District Court for the dismissal of Petitioners' *Bivens* claims. 951 F.2d at 1148, n.3.

REASONS FOR GRANTING THE WRIT

I.

THE NINTH CIRCUIT'S RULING AFFIRMING JUDGMENT AGAINST PETITIONERS ON THEIR FTCA CLAIM, APPEARS TO IMPLY A NEW EXCEPTION TO THE FTCA NOT SET FORTH IN 28 U.S.C. § 2680, AND THUS DIRECTLY CONFLICTS WITH THIS COURT'S PRIOR DECISIONS, INCLUDING THE *BERKOVITZ* RULING.

The Ninth Circuit's affirmation of summary judgment against Petitioners on their federal tort claim effectively implied a new exception to the Federal Tort Claims Act ("FTCA") not previously articulated by 28 U.S.C. § 2680. The Ninth Circuit simply concluded that "Congress clearly did not intend the FTCA to establish liability in tort for failure to comply with the notice and comment requirements for administrative rulemaking." 951 F.2d at 1147. The Court relied upon little more than a House Report on the FTCA as the authority for its ruling, which report stated that "[it is not] desirable or intended that the constitutionality of legislation, or the legality of a rule or regulation should be tested through the medium of a damage suit for tort." 951 F.2d at 1147, *citing*, H.R.Rep.No. 1287, 79th Cong., 1st Sess. 6 (1945) In its opinion, the Ninth Circuit offered no explanation how its aforementioned interpretation is to be reconciled with this Court's seminal ruling in *Berkovitz v. United States*, 486 U.S. 531 (1988). The Ninth Circuit's newly-created but foundationless exception to the FTCA deserves this Court's attention.

First, none of the exceptions to the FTCA set forth in 28 U.S.C. § 2680 support the Ninth Circuit's grounds for barring Petitioners' FTCA claim. Moreover, nowhere in the FTCA did Congress ever expressly state that a federal employee's failure and/or refusal to adhere to mandatory, nondiscretionary rule promulgation statutes or regulations, was to remain outside the scope of the FTCA's waiver of sovereign immunity.

Rather, the Ninth Circuit appears to have implied a new exception to the FTCA, where the federal employee's operational negligence involves the promulgation of rules in viola-

tion of his or her agency's mandatory, nondiscretionary statutes or regulations. The Ninth Circuit's creation of an implied exception to the FTCA clearly conflicts with this Court's longstanding precedent. "There is no justification for this Court to read exemptions into the Act beyond those provided by Congress. If the Act is to be altered that is a function for the same body that adopted it." *Rayonier, Inc., v. United States*, 352 U.S. 315, 320 (1957). Moreover, "the Government's liability is no longer restricted to circumstances in which government bodies have traditionally been responsible for misconduct of their employees. The Act extends to novel and unprecedented forms of liability as well." *United States v. Muniz*, 374 U.S. 150, 159 (1963), *citing, Indian Towing Co. v. United States*, 352 U.S. 61 (1955). "The Federal Tort Claim Act provides much-needed relief to those suffering injury from the negligence of governmental employees. As this Court has further dispositively observed, "[w]e should not...narrow the remedies provided by Congress." *Muniz*, *supra*, 374 U.S. at 165-166.

Equally in conflict with the Ninth Circuit's interpretation below of the House Report's indication of Congress' intent underlying the FTCA, is *Berkovitz v. United States, supra*, 486 U.S. 531. Indeed, the Ninth Circuit's interpretation of the quoted portion of House Report No. 1287 (out of the context in which Congress used the words) as exempting operational negligence in rule promulgation, further appears simply to be erroneous on its face.

As this Court observed in *Berkovitz, supra*, the quoted portion of subject House Report was given in the express context of "discuss[ing] the application of the discretionary function exception to the activities of regulatory agencies by stating that it [the discretionary function exception] would preclude application of the Act to 'a claim against a regulatory agency, such as the Federal Trade Commission or the Securities and Exchange Commission, based on an alleged abuse of discretionary authority by an officer or employee, whether or not negligence is alleged to have been involved." Id., 486 U.S. at 538-539, n.4. [emphasis supplied].

After reciting the same portion of the House report quoted by the Ninth Circuit below, "[n]or is it desirable or intended that the constitutionality of legislation, or the legality of a rule or regulation should be tested through the medium of a damage suit for tort," this Court ruled that "[t]his passage

illustrates that Congress intended the discretionary function exception apply to the discretionary acts of regulators, rather than to all regulatory acts." 486 U.S. at 539, n.4 [emphasis in original].

The Ninth Circuit's interpretation of the foregoing passage as barring a FTCA claim arising from the negligent noncompliance with a nondiscretionary rule-promulgation statute or regulation, outside the context of the discretionary function exception, cannot therefore be reconciled with this Court's controlling decision in Berkovitz.

Moreover, no attempt to "test the legality" of the August 18, 1987 letter ban by Petitioners in the proceeding below was either sought or required. In fact, the illegality of the letter ban was not at issue at all in the underlying proceedings. Rather, Petitioners maintained that that issue had been conclusively determined by the Ninth Circuit in *SCAAA*, supra, and that the respondents were collaterally estopped from raising the issue again in these proceedings.

In its opinion below, the Ninth Circuit even acknowledged at 951 F.2d 1148, n.4, that the issue of the illegality of the subject letter ban was not the subject of this case, but rather was conclusively resolved in *SCAAA, supra*. This acknowledgement, that it was the petition for review in *SCAAA*, 81 F.2d 672, which singularly "tested the validity of the regulation" at issue, adds further contradiction to lower Court's conclusion that Petitioners' FTCA claim in the underlying action herein was barred by Congress' desire that "the legality of a rule or regulation [not] be tested through the medium of a damage suit for tort." 951 F.2d at 1147.

The Ninth Circuit's further implied reliance upon *C.P. Chemical Co. v. United States*, 810 F.2d 34 (2d Cir. 1987) and *Jayvee Brand, Inc. v. United States,* 721 F.2d 385 (D.C. Cir. 1983) are misplaced. Both decisions, rendered before this Court's Berkovitz ruling, now stand in clear conflict with this Court's unambiguous pronouncements in Berkovitz. In C.P. Chemical, the Second Circuit held a FTCA claim based on an agency's failure to follow applicable rule promulgation procedures non-actionable, as it viewed rulemaking procedures to be "quasi-legislative...action...of the type that private persons should not engage in and hence could not be liable for under local law." Id., 810 at 37-38, citing *Jayvee Brand, supra*, 721 F.2d at 390. (Opinion of Bork, J., not joined by other panel members). Justice Bork in Jayvee Brand further declined to

segregate the rule formulation process from the operational rule promulgation process, instead characterizing the entire process as an "abuse of discretion," axiomatically subject to the exception of 28 U.S.C. § 2680(a).

In *Berkovitz, supra,* this Court once again expressly rejected such reasoning, "disapproving [this] argument that [the] FTCA precludes liability for the performance of 'uniquely governmental functions'," such as the licensing of pharmaceutical manufacturers therein. 486 U.S. at 539. This Court further made it clear in *Berkovitz,* and more recently in *United States v. Gaubert*, 499 U.S. ___, 113 L.Ed.2d 335, 346 (1991) that "[t]he requirement of judgment or choice [necessary to trigger the discretionary function exception] is not satisfied if a 'federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow,' because 'the employee has no rightful option but to adhere to the directive.'" *Gaubert, supra,* 113 L.Ed.2d at 346, *citing Berkovitz, supra,* 486 U.S. at 536.

Petitioners clearly alleged in their First-Amended Complaint that their damages were proximately caused by the negligent failure and/or refusal by the respondent's employees to follow the FAA's own mandatory, nondiscretionary statutes and regulations governing the promulgation of airspace rules, as to which they had no discretion not to adhere. Petitioners thus clearly stated a valid and cognizable claim for relief under the FTCA under this Court's controlling rulings in *Berkovitz* and *Gaubert.*

The Ninth Circuit's ruling thus has created a confusing precedent directly at odds with this Court's decisions in *Berkovitz* and *Gaubert*, which is, in turn, likely to generate further confusion among the other Circuits. This Court's scrutiny of the matter is thus imperative.

II.

THE NINTH CIRCUIT'S DETERMINATION THAT "FACTORS COUNSELLING HESITATION" BARRED PETITIONERS' BIVENS CLAIMS, ERRONEOUSLY PRESUMED THAT THE APA WAS APPLICABLE TO REVIEW OF FAA ORDERS, OR THAT A CONGRESSIONALLY-DEVISED REMEDIAL SCHEME TO ADDRESS UNLAWFUL FAA RULE PROMULGATION WAS EVER CREATED, AND IS THUS IN DIRECT CONFLICT WITH THE DECISIONS OF THIS COURT AND THE OTHER CIRCUITS.

The Ninth Circuit herein held that Congress' authorization in the APA for courts of appeals to set aside unconstitutional rulemaking constituted a principal factor counselling hesitation, and thus warranted denial of Petitioners' *Bivens* remedy. 951 F.2d at 1148. The foundational assumption made by the lower Court in reaching that conclusion is incorrect as a matter of well-settled law.

The Ninth Circuit mistakenly presumed, without further explanation, that the review provision of 5 U.S.C. 706(2)(B) (the APA) was available to Petitioners seeking judicial review of the August 18, 1987 letter ban. 951 F.2d at 1148, n.4. This was error. On the contrary, "[t]he APA is clearly not applicable to FAA action [reviewed] under [49 U.S.C.] Section 1486." *Suburban O'Hare Commission v. Dole,* 787 F.2d 186, 194 (7th Cir.) cert. den. 479 U.S. 847. Rather, "the specific review provisions [of 49 U.S.C. § 1486(a)] must take precedence over the general provisions of the Administrative Procedure Act..." *Rombough v. Federal Aviation Administration*, 594 F.2d 893 (2d Cir. 1979)

The August 18, 1987 letter ban below was ruled invalid, after the Petitioner in *SCAAA*, sought judicial of the ban pursuant to 49 U.S.C. Section 1486(a), which specifies that any affected party seeking such review of a final order of the FAA must directly petition the appropriate Circuit Court within 60 days of the order. See, 881 F.2d 672.

"[U]nder 49 U.S.App. Section 1486(a), judicial review of an order of the FAA is vested exclusively in the circuit courts of appeals." *Sima Products Corp. v. McLucas,* 612 F.2d 309 (7th Cir.) cert. den. 446 U.S. 908 (1980). *See, also, Sierra*

Club v. Skinner, 885 F.2d 591, 592 (9th Cir. 1989); *City of Rochester v. Bond,* 603 F.2d 927, 935-939 (D.C. Cir. 1979). Further, is well- established law throughout the land that an affected party's only means of obtaining judicial review of a newly-issued FAA order or rule, is by a timely-filed petition for review within the parameters of 49 U.S.C. § 1486(a). *Sierra Club, supra,* 885 F.2d at 592; *City of Rochester, supra,* 603 F.2d at 935-939.

In overlooking the legal inapplicability of the APA, i.e., 5 U.S.C. § 706, to review of FAA orders such as those at issue herein, the Ninth Circuit also apparently failed to appreciate that this exclusive path of review from the agency directly to the Circuit Court under § 1486(a), affords no substantive remedy. Rather, the statute is jurisdictional, merely defining the parameters by which elective judicial review of any order of the FAA, NTSB or CAB must proceed. *See, City of Rochester, supra,* 603 F.2d at 934-935; *Kolek v. Engen,* 869 F.2d 1281, 1284 (9th Cir. 1989) [holding that order of NTSB, also properly subject to review exclusively under § 1486(a), and that party's accidental misfiling of the petition in the district court, rather than circuit court, was curable via transfer of the petition under 28 U.S.C. § 1631.]

The Ninth Circuit's confusion and error on this point no doubt arises from the specific provisions of the Federal Aviation Act at issue below, which mandated that FAA rules affecting the use of navigable airspace must be issued in accordance with the APA. 49 U.S.C. § 1348(d). The subject letter ban of August 18, 1987 was just such a substantive airspace rule triggering mandatory APA compliance in its formulation and promulgation. *SCAAA*, supra, 881 F.2d at 676. Thus, in promulgating that or any other substantive airspace rule, the FAA was required under 49 U.S.C. § 1348(d), to "adhere to three steps...: notice of the proposed rule, opportunity to comment, and an explanation of the rule ultimately adopted. 5 U.S.C. § 553(b)." *San Diego Air Sports Center, Inc. v. Federal Aviation Administration,* 887 F.2d 966 (9th Cir. 1989).

However, once formulated and promulgated, the scope of review of such a FAA rule or order before the Circuit Court pursuant to 49 U.S.C. § 1486(a) is no longer governed by the APA, but rather by federal common law.

For example, in *Tiger International, Inc. v. Civil Aeronautics Board,* 554 F.2d 926, cert. den. 434 U.S. 975 (1977), the Ninth Circuit itself recognized the inapplicability

of the APA to determining the scope of review under § 1486(a), and rejected the application of a "supported by substantial evidence" standard (otherwise available under the APA). The Ninth Circuit itself therein instead adopted an "arbitrary, capricious, abuse of discretion, or otherwise not in accordance with law" standard of review. Id., 554 F.2d at 936; *Accord, Nevada Airlines, Inc. v. Bond,* 622 F.2d 1017 (9th Cir. 1980).

However, whether any review will ever in fact be available to a petitioner under § 1486(a) is a matter exclusively within the FAA's control: no such judicial review can or will be undertaken by the Circuit Court if the agency fails to produce "an administrative record adequate to permit evaluation of those claims." *SCAAA, supra,* 881 F.2d at 676. Thus, as observed below, serious governemental accountability problems potentially are raised where illegal FAA rulemaking is engaged in without its subsequent production of an administrative record axiomatically prerequisite to any judicial review.

In light of the federal common law genesis of the scope of review of FAA orders under § 1486(a), the Ninth Circuit further erred in concluding that the right to judicial review of constitutional issues raised on review was statutorily created pursuant to some deliberate or painstaking Congressional scheme. First, no such rights, nor any statement of the scope of review under § 1486(a) is stated anywhere in the Federal Aviation Act. Rather, as this Court has traditionally held, "when constitutional questions are in issue, the availability of judicial review is presumed." *Califano v. Sanders,* 430 U.S. 99, 109 (1977).

Moreover, this presumed right to judicial review of unlawful or unconstititional agency action had long been the common law rule enunciated by this Court well before the adoption of either the APA or Federal Aviation Act. *See, e.g., Shields v. Utah Idaho Central R. Co.,* 305 U.S. 177 (1938); Stark *v. Wickard,* 321 U.S. 288 (1944); *Alabama Power Co. v. Ickes,* 302 U.S. 464 (1936)

As this Court more recently observed in *Abbott Laboratories v. Gardner,* 387 U.S. 136, 140-141 (1967), the APA merely codified this already longstanding presumptive federal common law entitlement to judicial review of injurious agency action out of an effort to standardize review availability among the various agencies. See, also, 79th Cong.,

92 Cong.Rec. p.2153 (Mar. 12, 1946) [quoting U.S. Attorney General's comment on judicial review provisions from APA draft, noting that such provision, entitling affected parties to judicial review "reflects existing law," and citing *Alabama Power Co. v. Ickes, supra,* 302 U.S. 464.

The Ninth Circuit thus manifestly erred in concluding that Petitioners' right to judicial review of an FAA order was conferred by Congress' intent or design. No such right is conferred by the inapplicable, APA, nor by the merely jurisdictional provisions of 49 U.S.C. § 1486(a). Rather, because the right to judicial review of unconstitutional agency rulemaking is a fundamental, foundational precept of federal common law, and not some remedial, Congressional scheme intended to address constitutional violations, the Court below erred in affirming the dismissal of Petitioners' *Bivens* claims based upon this Court's ruling in *Schweiker v. Chilicky,* 487 U.S. 412 (1988). The Ninth Circuit's conclusion below further appears inconsistent even with its contrary recognition in its *SCAAA* decision, that judicial review of all substantive agency determinations is presumptively available, as a matter of law. See, 881 F.2d at 676.

Only Congress has the power to decide that a statutory or administrative scheme will foreclose a Bivens action. See, generally, *Schweiker v. Chilicky, supra,* 487 U.S. 412. As recently observed by the Eighth Circuit, "[t]o allow an administratively-created scheme to foreclose a *Bivens* action, without some real indication that Congress intended administratively-created scheme to have that result, would require us to hold that the legislative power to foreclose a Bivens action has been delegated -- a delegation almost certainly in violation of the separation of powers doctrine." *Kreuger v. Lyng,* 927 F.2d 1050, 1055 (8th Cir. 1991).

As with the meager regulations in *Kreuger* found not to have manifested Congressional intent that a *Bivens* remedy not also lie, the Federal Aviation Act "does not convey any intention by Congress in any way to deal in any particular way with remedies" for regulatees injured by the failure or refusal of FAA employees to follow the agency's mandatory statutes and regulations, "nor does it even suggest a policy decision about Bivens actions..." *Kreuger, supra,* 927 F.2d at 1055. The Federal Aviation Act is totally silent even as to the standard of review of such actions. It is this very absence of Congressional direction on the question of review which necessitated

the Courts' development of various federal common law standards in order to review various unlawful, arbitrary or capricious agency action. *See, Tiger International, supra.*

Nor do the facts of the case below fall within any of the only three classes of cases in which a *Bivens* remedy has been found not to lie. This is not a case where the comprehensiveness of a Civil Service Reform Act afforded albeit incomplete relief to a federal employee appealing a personnel action, *Kotarski v. Cooper*, 886 F.2d 311 (9th Cir. 1989); nor is this a case where the comprehensiveness of the Social Security Co ntinuing Disability Review program elucidated Congressional intent that no further *Bivens* relief lie, *Schweiker v. Chilicky, supra*, 487 U.S. 412; Nor is this a case where "the unique disciplinary structure of the military establishment and Congress' activity in the field constitute 'special factors' which dictate that it would be inappropriate to provide enlisted military personnel a *Bivens*-type remedy against their superior officers." *Chappell v. Wallace*, 462 U.S. 296 (1983)

On the contrary, "it seems plain to [Petitioners] that Congress never has given a moment's thought to the question of what sort of remedies should be available" to regulatees injured by an FAA employee's failure or refusal to adhere to the mandatory airspace rulemaking requirements of the Federal Aviation Act. *See, Kreuger, supra*, 927 F.2d at 1057. Indeed, that Congress failed even to anticipate this potentiality is exemplified by its silence on the scope of judicial review of such conduct, as well as the Circuit Courts' inability to provide any such review at all where the FAA fails or refuses to produce a foundationally-prerequisite administrative record for review.

"The existence of a reviewable administrative record is the determinative element in defining an FAA decision as an 'order' for the purposes of Section 1486." *Sierra Club, supra,* 885 F.2d at 593, *citing Suburban O'Hare Commission, supra,* 787 F.2d at 193. "If the FAA's record were inadequate to permit review directly in the court of appeals, we would be inclined to find that the action, although final, is not an order within the meaning of [Section 1846]." *Sima Products, supra,* 612 F.2d at 314.

Further, where the administrative record consists solely of the FAA order sought to be reviewed, and is in writing, only limited review of the procedural questions raised by that order is available. *See, San Diego Air Sports, supra,* 887 F.2d

at 966. But where the "order" or "rule" is oral, or withheld from production, clearly no judicial review at all would be available. *Sima Products, supra; Suburban O'Hare Commission, supra.* Moreover, because 49 U.S.C. § 1486(a) is the exclusive path for review, bypassing the district courts, there is no vehicle of civil discovery available to a petitioner to develop a record the FAA fails or refuses to develop or produce. It could thus be expected in the future that an agency seeking perhaps out of administative expedience to insulate its unlawfully-implemented orders, would simply not send a letter to a petitioner at all, such as was the case below. The agency could instead merely "announce" its intention, and/or without disclosure of the written substance of the order, perhaps citing "privilege."

Finally, it is clear that even where a *de minimus* administrative record is in fact produced by the agency sufficient to permit judicial review of the procedural issues raised, no review of the constitutional issues would genuinely ever expeted to be available. As observed in *SCAAA*, once the illegality of the letter ban for failure to adhere to the FAA's mandatory rule promulgation requirements was established, any further constitutional violation became moot. *SCAAA*, 881 F.2d at 678, n.6. And, conversely, had the rule promulgation action been adjudged in compliance with those same mandatory FAA statutes and regulations, there would axiomatically have been no unconstitutional conduct extant violative of the due process clause.

The reality of the regulatory environment thus makes it clear that Congress not only did not intend to provide a remedial mechanism for unconstitutional, unlawful FAA rule promulgation in violation of the agency's mandatory statutes and regulations. Rather, no such constitutional judicial review at all is genuinely available under the types of circumstances extant in this case. The Ninth Circuit's conclusion to the contrary, is untenable.

Accordingly, the Ninth Circuit's opinion denying Petitioners their *Bivens* remedy is in clear conflict with the prior decisions of this Court, its own prior rulings, and those of other Circuits. Moreover, that decision threatens to open up dangerous and fertile ground for the wanton trampling with impunity of citizen-regulatees' vulnerable due process rights by expedient regulators charged by their own mandatory statutes and regulations with protecting them. Plenary consideration of the matter by this Court is essential.

III.

IMPORTANT, HIGHLY DISTURBING AND UNRESOLVED QUESTIONS OF GOVERNMENT ACCOUNTABILITY ARE RAISED BY THE DECISION BELOW, BECAUSE THAT DECISION WOULD NOW PERMIT FAA OFFICIALS TO DO ILLEGALLY WITH IMPUNITY THAT WHICH THEY CANNOT LEGALLY DO UNDER THEIR MANDATORY STATUTES AND REGULATIONS.

The Ninth Circuit has herein held that neither the FAA, nor its officers, are heretofore accountable for their failure and/or refusal to adhere to the mandatory FAA statutes and regulations which were intended to safeguard the valuable rights and property interests of the nation's airspace users.

Although the district court cut off Petitioners' pending discovery at the FAA's ex parte request, Petitioners fully expected that discovery to disclose that respondent's unlawful conduct in violation of their own statutes and regulations, was intentionally undertaken out of administrative expedience. Respondent knew that they could not legally have promulgated such an economically devastating ban under their own governing mandatory statutes and regulations.

As previously noted, judicial review of unconstitutional FAA rule promulgation is genuinely unavailable, as long as the administrative record on review consists of no more than the asserted order or rule challeged itself. *SCAAA,* 881 F.2d at 676. No review at all is expected to be available where the rule or order is withheld or issued in oral form. *Suburban O'Hare Commission, supra.* Denial of a *Bivens* or other tort remedy for this type of unlawful and unconstitutional FAA conduct herein will only ensure the continued unavailability of any vehicle for civil discovery sufficient to develop a record adequate to disclose unconstitutional conduct by the FAA and/or its employees.

Nor does the Ninth Circuit's ruling herein offer any deterrence whatsoever to the prospective expedient disregard of the FAA's mandatory rule promulgation statutes and regulations designed to protect and safeguard the airspace use rights declared by Congress to exist in each citizen of the United States. See 49 U.S.C. § 1304.

In *Schweiker v. Chilicky, supra,* this Court enunciated its caution in expanding governmental tort liability where to do so would frustrate or undermine important governmental interests or existing Congressionally-designed and implemented remedial programs. This Court was therein particularly cognizant of "Congressional...balancing of governmental efficiency and the rights of individuals." *Chilicky, supra,* 487 U.S. at 425.

It is submitted that, prior to this case, this Court had not yet been presented with the very real prospect that hesitation in affording a tort remedy would actually encourage further expedient governmental regulatory noncompliance apathy, thus further endangering the rights and property interests of its citizens. Nor is this potentiality either speculative, novel, or devoid of precedent: it is submitted this has already become a recidivistic FAA practice.

In addition to the illegal August 18, 1987 letter ban involved in this case, the FAA later that year also issued a similarly destructive illegal ban letter to parachute operators in San Diego, California. *See, San Diego Air Sports Center, Inc., supra,* 887 F.2d 968. Earlier that year, in Western Nevada, the FAA established a military operations area in a wilderness area, claiming that it was not "a rule, regulation or order," a position adjudged disingenuous by the Ninth Circuit in *Sierra Club v. Skinner, supra,* 885 F.2d at 592. Clearly, the FAA's expedient disregard of 49 U.S.C. § 1348(d) has already threatened to become a nationwide problem affecting a wide-ranging segment of citizens and imperiling their constitutional rights.

Absent this Court's informed and reasoned consideration of the matter, the Ninth Circuit's decision below cannot now be expected to rectify, but only further to exacerbate, this urgent regulatory crisis.

CONCLUSION

For these various reasons, this petition for certiorari should be granted. If the Petitioners are correct in urging that the Ninth Circuit erred, the matter should be remanded to the Ninth Circuit Court of Appeals for a full and appropriate

disposition of the other issues not reviewed by that Court on appeal.

Respectfully Submitted,

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APPENDIX

951 F.2d 1146

SKY AD, INC., Robert Cannon, Plaintiffs-Appellants,
v.
Homer C. McCLURE, Jacqueline Smith, Merle Clure, John Mayhoffer, James A. Holweger, Defendants-Appellees.
No. 90-56021.
United States Court of Appeals,
Ninth Circuit.
Argued and Submitted Aug. 15, 1991.
Decided Dec. 24, 1991.

Business injured by Federal Aviation Administration's (FAA's) invalid rule banning fixed-wing aircraft from particular air route brought action to recover damages. The United States District Court for the Central District of California, Manuel L. Real, Chief Judge, granted summary judgment for government, and appeal was taken. The Court of Appeals, Norris, Circuit Judge, held that Congress did not intend Federal Tort Claims Act to establish liability in tort for failure of FAA to comply with publication and comment requirements in administrative rule making.

Affirmed.

1. FEDERAL COURTS § 759.

Grant of summary judgment may be affirmed on any basis that is supported by record.

2. AVIATION § 31

Congress did not intend Federal Tort Claims Act to establish liability in tort for failure of Federal Aviation Administration to comply with publication and comment requirements in administrative rule making. 28 U.S.C.A. s 1346(b).

3. AVIATION § 31

Special factors precluded imposition of tort liability against Federal Aviation Administration officials, whose promulgation of invalid rule allegedly violated constitutional rights of affected business; Administrative Procedures Act provided explicit relief for unconstitutional rule making, Congress had rejected tort remedies for invalid rule making in Federal Tort Claims Act, and business' tort theory was unprecedented. 5 U.S.C.A. § 553; 28 U.S.C.A. § 1346(b).

Scott D. Raphael, Fenigstein & Kaufman, Los Angeles, Cal., for plaintiffs-appellants.

James R. Sullivan, Asst. U.S. Atty., Civil Div., Los Angeles, Cal., for defendants-appellees.

Appeal from the United States District Court for the Central District of California.

951 F.2d 1147

Before NORRIS and THOMPSON, Circuit Judges, and KING, Dis trict Judge. [FN*]

NORRIS, Circuit Judge:

This action arises out of an FAA rule banning fixed wing aircraft from the air route along the portion of California coast from Northern San Diego County to Ventura County known as the "shoreline transition." In Southern California Aerial Advertisers' Ass'n v. FAA, ("SCAA"), 881 F.2d 672, 678 (9th Cir.1989), we held that the ban was a substantive rule

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FN* Honorable Samuel P. King, Senior United States District Judge for the District of Hawaii, sitting by designation.

and that it was invalid because it was not promulgated in compliance with the publication and comment requirements of the Administrative Procedure Act ("APA"), 5 U.S.C. § 553. Appellant Robert Cannon is the sole owner of appellant Sky Ad, Inc., which was in the business of towing advertising banners by fixed-wing aircraft along the Southern California coast. Alleging that the FAA rule banning fixed-wing aircraft from the shoreline transition destroyed their business, appellants brought this action for damages on two discrete bases: First, they claimed that the United States is liable under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 1346(b), because the FAA's failure to comply with the APA in promulgating the rule constituted a breach of the duty of due care the FAA owed to appellants. Second, appellants claimed that individual FAA officials are liable under Bivens v. Six Unknown Agents, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971), for violating their constitutional rights.

The district court awarded summary judgment to the United States on the FTCA claim and dismissed the Bivens claim under Fed.R.Civ.P. 12(b)(6) for failure to state a claim.

I

The United States initially moved to dismiss the FTCA claim under Fed.R.Civ.P. 12(b)(6) on the ground that the type of damages appellants sought to recover were not cognizable under California law. The district court denied the motion, but granted a later United States' motion for summary judgment on the grounds that appellants failed to establish proximate cause and that the FTCA exceptions for discretionary functions, misrepresentations, and interference with contract rights applied.

[1][2] We need not review this summary judgment because we hold that Congress clearly did not intend the FTCA to establish liability in tort for failure to comply with publica

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FN1. Although the United States did not advance this argument, we may affirm summary judgment on any basis that is supported by the record. See United States v. Simas, 937 F.2d 459, 462 (9th Cir.1991).

tion and comment requirements for administrative rulemaking. [FN1] A House Report on the FTCA stated: "[It is not] desirable or intended that the constitutionality of legislation, or the legality of a rule or regulation should be tested through the medium of a damage suit for tort." H.R.Rep. No. 1287, 79th Cong., 1st Sess. 6 (1945). Accordingly, appellants' claim must be dismissed. [FN2]

The Second Circuit also reasoned that the discretionary function exception barred the claim because the ban itself was discretionary and that "the procedures by which a rule is adopted are integral to, and intertwined with, the decision to adopt the substantive regulation." 810 F.2d at 37. See also Adras v. Nelson, 917 F.2d 1552-57 (11th Cir.1990) (FTCA claim based on deviation from APA publication and comment requirements in promulgating substantive rule barred by discretionary function exception).

Because we find that Congress clearly intended that failure to comply with publication and comment requirements for rulemaking not state a claim under the FTCA, we express no view on either of these two rationales put forth by the Second Circuit.

FN2. Our holding that appellants do not state a claim is consistent with that of the Second Circuit in a nearly identical case. The plaintiff in C.P. Chemical Co. v. United States, 810 F.2d 34 (2d Cir.1987), asserted an FTCA claim for the failure of an agency to follow applicable statutory procedures in promulgating a rule banning its product. After stating that the "plain meaning [of the FTCA] is that the United States cannot be held liable when there is no comparable cause of action against a private citizen," id. at 37-38, the Second Circuit held that the United States is not liable under the FTCA for an agency's failure to abide by applicable rulemaking procedures because " 'quasi- legislative ... action ... is action of the type that private persons could not engage in and hence could not be liable for under local law.' " Id. (quoting Jayvee Brand, Inc. v. United States, 721 F.2d 385, 390 (D.C.Cir.1983) (opinion of Bork, J.) (not joined by other panel members)).

II

[3] We next consider the district court's dismissal of the appellants' Bivens claim under Fed.R.Civ.P. 12(b)(6). As Bivens itself emphasized, the implication by courts of a tort action for alleged constitutional violations is inappropriate when there are "special factors counselling hesitation in the absence of affirmative action by Congress." Bivens v. Six Unknown Agents, 403 U.S. 388, 396, 91 S.Ct. 1999, 2004-05 (1971). We affirm the dismissal of appellants' Bivens claims because the presence of an explicit remedy for unconstitutional rulemaking in the APA, Congress' rejection of tort remedies for rulemaking in the FTCA, and the overall unprecedented nature of appellants' tort theory are such special factors. [FN3]

In Kotarski v. Cooper, 866 F.2d 311, 312 (9th Cir.1989), we enunciated a test for implication of a Bivens action when Congress has provided some remedy for constitutional violations. We stated there that we would not imply a Bivens action to supplement relief under another congressionally enacted plan "[s]o long as Congress' failure to provide money damages, or other significant relief, has not been inadvertent." Id. Congress' authorization in the APA for courts of appeals

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FN3. The individual FAA officials first argued promulgation of the ban did not violate any constitutional right. Even if the allegations rose to the level of a violation of a constitutional right, they argued that a Bivens action should not be implied because Congress provided other remedies under the APA. Even if a Bivens action were implied, they argued it would be barred by qualified immunity and the statute of limitations. Finally, they argued that appellants had made no showing of proximate cause. We need only decide the question whether there are special factors counselling hesitation in implying a tort remedy in the absence of Congressional action.

to set aside unconstitutional rulemaking triggers this test.[FN.4].

In light of this test, we find it significant that Congress indicated that tort damages were an inappropriate remedy for unconstitutional rulemaking. As we noted above, a House Report on the FTCA stated that Congress did not intend to use tort suits for damages to resolve questions about the constitutionality of rulemaking. See supra p. 1148.

Although we have not located any explicit discussion of the precise question presented here, we think the legislative history of the APA suggests another special factor counselling hesitation: the unprecedented nature of appellants' tort theory. A congressman described the publication and comment requirements of the APA as "much like the hearings that we now have before our committees in the House." 92 Cong. Rec. 5656 (1946) (remark of Rep. Gwynne). In essence, then, appellants' theory would be equivalent to holding individual members of Congress liable for irregularities in their conduct of hearings. We hardly find it surprising that the legislative history does not include extensive consideration of such a tort theory that would be, at a minimum, novel. See Jayvee Brand, Inc. v. United States, 721 F.2d 385, 396 (D.C.Cir.1983) (Lumbard, J., concurring) (the novelty of a claim based on failure to comply with publication and comment requirements in promulgating a rule counsels

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FN4. The APA provides, in pertinent part, that the courts of appeal may set aside agency action "contrary to constitutional right." 5 U.S.C. § 706(2)(B) (1988).

In SCAA, we invalidated the order because it was promulgated in violation of the publication and notice requirements of the APA and therefore found it unnecessary to consider Sky Ad's argument that the ban violated due process. 881 F.2d at 678 n. 6. Because we conclude that Sky Ad is entitled to no additional relief for any constitutional violations, we also need not decide today whether failure to adhere to the publication and comment requirements of the APA offends due process or, as appellants suggest, whether a ban that distinguishes between types of aircraft offends equal protection.

against imposing liability under the FTCA). [FN5]

This unprecedented nature of appellants' tort theory, in addition to the explicit remedies provided by the APA and Congress' rejection of tort remedies under the FTCA for procedural flaws in rulemaking, makes us confident that Congress did not inadvertently fail to provide an action for money damages against individual government officials for failure to comply with publication and comment requirements. Under Kotarski, we must therefore affirm the district court's dismissal of the action. 866 F.2d at 311. [FN6]

FN5. We express no view on Judge Lumbard's suggestion that the FTCA encompasses only claims for " 'ordinary common-law torts' (e.g., negligent auto accidents)." Id. 721 F.2d at 396.

FN6. Our holding comports with the D.C. Circuit's that a firm did not state a Bivens claim against Consumer Product Safety Commissioners for their failure to comply with applicable publication and comment requirements in promulgating a ban of its product. Jayvee Brand, id. at 395. Jayvee Brand held that a Bivens claim would not be implied for such "quasi-legislative rulemaking" because "[l]egislation is a function entitled to absolute immunity, with the immunity following the function and not the office." Id. (citations omitted). Although Jayvee Brand's analysis relies on the Supreme Court's extension of absolute legislative immunity to state supreme court judges promulgating rules for attorney discipline in Supreme Court of Virginia v. Consumers Union, 446 U.S. 719, 734, 100 S.Ct. 1967, 1976, 64 L.Ed.2d 641 (1980), we note that the Court has more recently been "quite sparing in its recognition of claims to absolute official immunity," Forrester v. White, 484 U.S. 219, 108 S.Ct. 538, 542, 98 L.Ed.2d 555 (1988); cf. Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391, 404 n. 26, 99 S.Ct. 1171, 1178 n.26, 59 L.Ed.2d 401 (1979) (declining to reach question of whether legislative immunity attached to such local rulemakers as city commissioners). We therefore express no opinion on the proper scope of immunity here.

III

Finally, we consider appellants' argument that a letter by United States' counsel informing us of a recent decision by another panel of this court establishing the statute of limitations for Bivens claims warrants sanctions under Fed.R.App.P. 28(j) for failure to cite the decision "without argument." In an effort to show that the letter is improperly argumentative, appellants cite Southern Carolina Electric & Gas Co. v. I.C.C., 734 F.2d 1541 (D.C.Cir.1984). Appellant there argued that its objection to a new regulation was ripe and cited a recent decision of the I.C.C. applying the regulation to a different party. In addition to citing the new I.C.C. decision, the appellant there argued that the new regulation would affect "the course of contract rate negotiations." Id. at 1546. The letter in this case, in contrast, only applies the statute of limitations adopted in the recent case to the dates of the FAA rule. This is hardly argument and falls far short of a violation of Rule 28(j). [FN7]

IV

For the reasons stated herein, we AFFIRM the orders of the district court awarding summary judgment to the United States on the FTCA claim and dismissing the Bivens claims against the individual FAA officials for failure to state a claim. The motion for sanctions is DENIED.

FN7. Moreover, although the D.C. Circuit characterized the letter as an "impermissible attempt to supplement oral argument," id. at 1546, there is no indication that it awarded sanctions.